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Nos. 03-603 & 03-656

In the Supreme Court of the United States

AVE M. BIE, BURNEATTA BRIDGE, AND ROBERT M. GARVIN, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN, IN THEIR OFFICIAL CAPACITIES,
AND
WORLDCOM, INC.,

Petitioners,

V.

WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN IN OPPOSITION

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QUESTION PRESENTED

Whether the detailed procedures mandated by Congress for implementing interconnection obligations between competing telephone carriers via interconnection agreements formed by negotiation, arbitration, state commission approval, and federal court review preempt a state commission order imposing significant new interconnection and access obligations by an alternative method that bypasses those federal procedures.

RULE 29.6 STATEMENT

Respondent Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("SBC") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

A. The Telecommunications Act of 1996 1

B. Interconnection Agreements 2

C. The Proceedings Below 3

REASONS FOR DENYING THE PETITIONS 6

I. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THE DECISION OF ANY OTHER COURT OF APPEALS 6

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS 14

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT PREVENT STATES FROM IMPLEMENTING LOCAL POLICIES 22

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases:

Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971).....15, 16, 22

AT&T Communications v. *BellSouth Telecommunications, Inc.*, 238 F.3d 636 (5th Cir. 2001).....19

AT&T Communications of Illinois, Inc. v. *Illinois Bell Tel. Co.*, __ F.3d __, 2003 WL 22533675 (7th Cir. Nov. 10, 2003).....22

AT&T Corp. v. *FCC*, 220 F.3d 607 (D.C. Cir. 2000).....21

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999).....*passim*

Buckman Co. v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001).....18

City of Columbus v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002).....23

Crosby v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).....14, 15

Director, Office of Workers' Compensation Programs v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995).....15

Gade v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992).....*passim*

TABLE OF AUTHORITIES — Continued

Page(s)

Garner v. *Teamsters Union*, 346 U.S. 485 (1953) 15

Geier v. *American Honda Motor Co.*, 529 U.S. 873 (2000) 14, 17, 18

GTE North, Inc. v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 531 U.S. 957 (2000) 7, 19

Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986) 7

MCI Telecommunications Corp. v. *AT&T*, 512 U.S. 218 (1994) 15

MCI Telecommunications Corp. v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3d Cir. 2001), cert. denied, 537 U.S. 941 (2002) 2, 19, 26

MCI Telecommunications Corp. v. *Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000), cert. denied, 531 U.S. 1132 (2001) 3, 19, 21

Michigan Bell v. *MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348 (6th Cir. 2003) 9, 10, 11

Rodriguez v. *United States*, 480 U.S. 522 (1987) 6

Southwestern Bell Tel. Co. v. *Connect Communications Corp.*, 225 F.3d 942 (8th Cir. 2000) 19

United States v. *Locke*, 529 U.S. 89 (2000) 17

Verizon Comms., Inc. v. *FCC*, 535 U.S. 467 (2002) 25

TABLE OF AUTHORITIES — Continued

Page(s)

Verizon Md. v. *RCN Telecom Servs.*,
232 F. Supp. 2d 539 (D. Md. 2002) 26

Verizon North, Inc. v. *Strand*, 309 F.3d 935
(6th Cir. 2002), cert. denied,
123 S. Ct. 1649 (2003) .....*passim*

U.S. West Comms., Inc. v. *Sprint Comms. Co.*,
275 F.3d 1241 (10th Cir. 2002).....9, 11, 12

Statutes:

47 U.S.C. § 251 .....*passim*

47 U.S.C. § 251(b).....1, 16

47 U.S.C. § 251(c).....1, 16

47 U.S.C. § 251(c)(1).....2, 24

47 U.S.C. § 251(c)(3).....1

47 U.S.C. § 251(d)(3).....17, 18

47 U.S.C. § 252 .....*passim*

47 U.S.C. § 252(a)(1).....2, 16

47 U.S.C. § 252(b).....2, 16

47 U.S.C. § 252(b)(1).....24, 26

TABLE OF AUTHORITIES — Continued

Page(s)

47 U.S.C. § 252(b)(3) 5

47 U.S.C. § 252(b)(4)(A) 16

47 U.S.C. § 252(b)(4)(C) 16, 24

47 U.S.C. § 252(d) 2, 16

47 U.S.C. § 252(e)(1) 3, 22

47 U.S.C.. § 252(e)(2) 3

47 U.S.C. § 252(e)(2)(A)(i) 23

47 U.S.C. § 252(e)(2)(A)(ii) 23

47 U.S.C. § 252(e)(3) 22

47 U.S.C. § 252(e)(4) 3, 16

47 U.S.C. § 252(e)(5) 3

47 U.S.C. § 252(e)(6) 3, 16, 26

47 U.S.C. § 252(f) 20, 21

47 U.S.C. § 252(f)(1) 20

47 U.S.C. § 252(i) 23

47 U.S.C. § 261(b) 7, 17

47 U.S.C. § 261(c) 7, 17

TABLE OF AUTHORITIES — Continued

Page(s)

Other Authorities:

FCC Wireline Competition Bureau, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 12, 2002, Table 1 (June 2003) (available at http://www.fcc.gov)....27

First Report and Order, 11 F.C.C.R. 15,499 (1996).....24

H.R. Conf. Rep. No. 104-458 (1996).....2

In re Petition of WorldCom, Inc., 17 F.C.C.R. 27039 (2002).....13

In re Public Util. Comm'n of Texas, 13 F.C.C.R. 3460 (1997), aff'd, 164 F.3d 49 (D.C. Cir. 1999).....12, 13 20

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 03-36 (rel. Aug. 21, 2003), available at 2003 WL 22175730 .....17, 18, 24, 25

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151) .....*passim*

BRIEF FOR WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN IN OPPOSITION

STATEMENT

A. The Telecommunications Act of 1996. This case concerns the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). The Act establishes a "new *federal* regime" that "fundamentally restructures local telephone markets." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 379 n.6 (1999) (emphasis in original). Under this regime, Congress vested the Federal Communications Commission ("FCC") with broad authority to make general rules and regulations for implementing the new federal standards created by the Act. *Id.* at 377-378 & n.5. As this Court has explained, "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 379 n.6.

B. Interconnection Agreements. The key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252. Rather than rely on the historical regime of tariffing, Congress enacted these sections to establish carrier-to-carrier "interconnection agreements" as the federally mandated vehicles for implementing the market-opening duties set forth in section 251 of the Act. See *Iowa Utils. Bd.*, 525 U.S. at 371; see generally 47 U.S.C. §§ 251(b)-(c). Section 251(c)(3) of the Act requires an incumbent local exchange carrier ("LEC") like SBC to provide "access to network elements on an unbundled basis * * * in accordance with the terms and conditions of [its interconnection] agreement and the requirements of [section 251] and section 252." 47 U.S.C. § 251(c)(3).

The section 252 process involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) federal court review. At every stage of the process, federal law sets the pertinent standards.

In accordance with Congress's goal of creating a "de-regulatory" framework for local competition (see H.R. Conf. Rep. No. 104-458, at 113 (1996)), the Act makes interconnection a matter of private negotiation. At the beginning of the process, a competing LEC asks the incumbent LEC to negotiate an interconnection agreement. 47 U.S.C. § 252(a)(1). Both parties must "negotiate in good faith." *Id.* § 251(c)(1). The Act provides that "an incumbent [LEC] may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). This right to conclude an agreement that does "not conform to all the detailed, specific requirements of § 251" reflects the Act's "clear preference" for "negotiated agreements" and "bestows a benefit to those carriers able to resolve issues through negotiation and compromise." *MCI Telecommunications Corp.* v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001), cert. denied, 537 U.S. 941 (2002); see also *Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., concurring in part and dissenting in part) ("[s]ection 252 sets up a preference for negotiated interconnection agreements"); *Verizon North, Inc.* v. *Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("private negotiation * * * is the centerpiece of the Act"), cert. denied, 123 S. Ct. 1649 (2003).

If the negotiation process does not produce a complete interconnection agreement, either party may (during a specified period) ask the state commission to arbitrate "open issues." 47 U.S.C. § 252(b). And the Act provides procedural and substantive guidelines governing arbitration. 47 U.S.C. §§ 252(b)-(d).

Following negotiation and arbitration, the parties must submit to the state commission any agreement they reach. 47 U.S.C. § 252(e)(1). The Act authorizes the state commission to "approve or reject the agreement" (*ibid.*), and provides specific "grounds for rejection" that vary depending on whether the agreement (or portion thereof) was adopted by negotiation or arbitration (*id.* § 252(e)(2)).

At the conclusion of the negotiation, arbitration, and approval process, the Act provides for federal court review of the state commission's determinations to ensure that they "meet[] the requirements of" sections 251 and 252. 47 U.S.C. § 252(e)(6). The Act also states that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement." 47 U.S.C. § 252(e)(4). Thus, "subsections 252(e)(1), (e)(4), and (e)(5), taken together and read in conjunction with the FCC regulations, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place," and under that scheme "federal district courts have exclusive jurisdiction to review FCC or state commission actions relating to interconnection agreements." *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 329 (7th Cir. 2000), cert. denied, 531 U.S. 1132 (2001).

C. The Proceedings Below. On September 25, 2001, the Public Service Commission of Wisconsin ("PSCW" or "Commission") issued a Final Decision in which it ordered SBC to provide new combinations of network elements — including the "unbundled network element platform" or "UNE-P" — to competing LECs and to make those new combinations available "as a general proposition" through tariffs filed with the Commission. See Pet. App. 56a.[1] SBC

[1] "Pet. App." refers to the appendix to WorldCom's petition for certiorari (No. 03-603).

subsequently filed a petition for rehearing, which the Commission denied on November 14, 2001. *Id.* at 76a.

UNE-P is the "combination of several network elements that collectively permit the requesting competing carrier to provide traditional local voice telephone service." WorldCom Pet. 10. Using UNE-P, a competitor can lease at extremely low prices *all* elements of the network necessary to provide local service, and can thus re-sell SBC's local service. UNE-P is the primary means by which many of SBC's largest competitors — including WorldCom and AT&T — have chosen to compete with SBC. The Commission's order requires SBC to provide UNE-P, and allows competitors to demand UNE-P, without any negotiation, mediation, arbitration, or federal court review of the applicable prices, terms, and conditions, and indeed without any interconnection agreement provisions governing UNE-P at all. Instead, the Commission's order requires SBC to adhere, upon a competitor's demand, to a tariff composed of state-determined UNE-P terms and conditions.

SBC filed a complaint alleging that the Commission's order violated federal law by requiring that SBC provide those new combinations through a state tariff. The district court granted relief on the ground that the Commission's order "is inconsistent with and preempted by § 252 of the Telecommunications Act." Pet. App. 34a.

The district court explained that "Congress gave sweeping authority to the federal government to regulate telecommunications." Pet. App. 28a. The court further observed that "Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection." *Id.* at 29a. In these circumstances, it was appropriate to apply the well-established principle that "[e]ven if a state-imposed tariff furthers competition, as the commission's action seems to do, it may be preempted 'if it interferes with the *methods* by

which the federal statute was designed to reach [its] goal.'" *Ibid.* (emphasis in original) (citing, *inter alia*, *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992)).

The district court concluded that the Commission's order interferes with Congress's prescribed methods because it "requires [SBC] to sell certain combinations of network elements using a procedure that allows an entrant to bypass the Telecommunications Act's provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision." Pet. App. 29a. The court found that the Commission's order "interferes with the incumbent's ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff" and held that the "decision impos[ing] a tariff that the entrant may select unilaterally in lieu of the interconnection agreement process * * * is inconsistent with § 252 of the Telecommunications Act." *Id.* at 33a-34a.

The Seventh Circuit, in an opinion authored by Judge Posner and joined by Judge Easterbrook, affirmed. The court ruled that "[t]he district court was right to hold that the state's tariffing requirement is preempted." Pet. App. 5a.

The court relied on *Gade* and Judge Boggs' decision for the Sixth Circuit in *Verizon North Inc.* v. *Strand*, 309 F.3d 935 (6th Cir. 2002), for the principle that "[w]hether * * * the state's tariff-filing order is preempted by the provisions of the federal act creating the contractual route to interconnection depends on whether the state requirement interferes with the federal procedure." Pet. App. 2a-3a. Applying this principle, the Seventh Circuit agreed with the district court that this state-imposed tariff "interfere[s] with the procedures established by the federal act." *Id.* at 6a. Among other things, "[t]he tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." *Id.* at 7a (citing 47 U.S.C. § 25[2](b)(3)). "At

the very least," the court concluded, "the tariff requirement complicates the contractual route by authorizing a parallel proceeding." *Id.* at 6a.

The court rejected petitioners' argument that the State Commission's bypass of the federal Section 252 process was permissible because it allegedly "promotes the procompetitive policy of the federal act." Pet. App. 7a. "[T]o identify the policy underlying a statute and then run with it is a dangerous method of interpretation; it is likely to run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place." *Ibid.* (citing, *inter alia*, *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)). The Seventh Circuit held that "[t]he negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure." *Ibid.*

REASONS FOR DENYING THE PETITIONS

I. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THE DECISION OF ANY OTHER COURT OF APPEALS

The only two courts of appeals that have addressed the question presented in this case (the Sixth and Seventh Circuits) have both held that state-law tariffing requirements imposing interconnection obligations on an incumbent carrier that bypass the interconnection agreement process prescribed by Congress are preempted. There is no contrary authority. Because there is no circuit conflict and the decision below is plainly correct, the question presented in the petitions does not warrant this Court's review.

Earlier this year, this Court denied a state commission's petition for a writ of certiorari — raising the same question

and the same inter-circuit conflict argument asserted again by petitioners — in the Sixth Circuit case that the Seventh Circuit followed here. See 123 S. Ct. 1649 (Mar. 31, 2003). In *Verizon North*, Judge Boggs, writing for a unanimous Sixth Circuit panel, invalidated a state-law tariff requirement imposed on an incumbent LEC on the ground that the tariff order "ignores and bypasses the detailed process for interconnection set out by Congress" in the 1996 Act. 309 F.3d at 944. The Sixth Circuit noted that "[t]he central question in preemption analysis is always 'whether Congress intended that federal regulation supersede state law.'" *Id.* at 940 (quoting *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986)). In the several savings clauses contained in the 1996 Act, "Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the [Act]." *Ibid.* (citing 47 U.S.C. § 261(b) (saving only state commission regulations that "are not inconsistent with the provisions of [the Act]") and *id.* § 261(c) (permitting additional state requirements "as long as the State's requirements are not inconsistent with [the Act]")).

Quoting its earlier decision in *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 923 (6th Cir.), cert. denied, 531 U.S. 957 (2000), the Sixth Circuit held that state commissions "administering the [1996 Act's] regulatory framework * * * must operate strictly within the confines of the statute." *Verizon North*, 309 F.3d at 940. The court observed that "state law provisions can be inconsistent with, and therefore preempted by, federal law even if the federal and state laws share a common goal" if the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." *Ibid.* (citing, *inter alia*, *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992)).

Applying these principles, the Sixth Circuit concluded that a state-law requirement to tariff a menu of unbundled network elements is preempted by federal law. In sections 251 and 252 of the Act, the Sixth Circuit explained,

"Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationships." *Verizon North*, 309 F.3d at 939. The court rejected the argument that this comprehensive federal procedure was just "one method" for implementing interconnection and access obligations and that states are "free to devise alternative methods under which competitors could acquire services and network elements from incumbents." *Id.* at 941. Rather, "the detailed procedural scheme — including negotiation, arbitration, state commission approval, FCC oversight, and federal judicial review — set out in § 252 is central to [the Act]," and should not "be evaded by state rule-making." *Ibid.* Because the Michigan commission's tariffing requirement "ignore[d] and bypasse[d] the detailed process for interconnection set out by Congress in the [1996 Act]," the Sixth Circuit invalidated the tariffing requirement as inconsistent with federal law. *Id.* at 944.

Relying on *Verizon North*, the Seventh Circuit reached the same conclusion here. As Judge Posner's opinion states, the Wisconsin commission "create[d] an alternative method by which a competitor can obtain interconnection rights" to access UNE-P and other network element combinations by "simply order[ing] Wisconsin Bell to file tariffs setting forth the price and other terms on which competitors such as WorldCom shall be entitled to interconnect with Wisconsin Bell's local telephone network." Pet. App. 2a. To evaluate the lawfulness of this state-law tariffing requirement, the Seventh Circuit applied the same legal standard that the Sixth Circuit utilized (*id.* at 2a-3a):

> Whether * * * the state's tariff-filing order is preempted by the provisions of the federal act creating the contractual route to interconnection depends on whether the state requirement interferes with the federal procedure. The [1996 Act] is

> explicit that a state commission's regulations concerning interconnection are not preempted "if such regulations are not inconsistent with the provisions of [the Act]." [Citing 47 U.S.C. § 261(b) and *Verizon North*.] But if they are inconsistent, they are preempted. A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law. [Citing *Gade*.]

Applying these principles, the court held that "the state's tariffing requirement is preempted" because it "interfere[s] with the procedures established by the federal act" by "enabl[ing] would-be entrants to bypass the federally ordained procedure." Pet. App. 5a-7a.

Petitioners attempt to manufacture a circuit conflict by pointing to two other decisions — a Sixth Circuit decision (*Michigan Bell* v. *MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348 (6th Cir. 2003)) decided shortly after *Verizon North* and an earlier Tenth Circuit decision (*U.S. West Comms., Inc.* v. *Sprint Comms. Co.*, 275 F.3d 1241 (10th Cir. 2002)). That argument is wholly unavailing. Neither decision addressed the question presented in this case and *Verizon North*.

To begin with, the panel in *Michigan Bell* did not purport to disagree with the governing circuit law set forth in *Verizon North*. To the contrary, the Sixth Circuit in *Michigan Bell* applied the same legal standards it had applied a mere four months earlier in *Verizon North* (and the same legal standards applied by the Seventh Circuit in this case). See 323 F.3d at 358-360. In applying those standards, the Sixth Circuit was careful to "distinguish" *Michigan Bell* from *Verizon North*. *Id.* at 360. The court acknowledged the comprehensive federal system for the implementation of the interconnection duties created by the Act, but observed that "the Act is silent with respect to *preexisting* state duties." *Id.*

at 359. The court then noted that in *Michigan Bell* "the tariffs preexisted the interconnection agreement," *id.* at 360, and held that "in this particular instance" the pre-existing tariff allowing MCI to "transmit resale orders" by fax may be enforced without "frustrat[ing] the purposes of the Act," *id.* at 361.[2]

The fact that no court has identified a conflict is hardly surprising in view of the unusual facts and narrow holding in *Michigan Bell*. Contrary to WorldCom's suggestion, *Michigan Bell*, unlike this case, did not involve a tariff that imposed substantive interconnection obligations on an incumbent carrier outside the section 252 agreement process. Rather, the case concerned merely the manner of "transmit[ting] resale orders." 323 F.3d at 361. At issue in *Michigan Bell* was a *pre-existing* state tariff under which competitors were able to order wholesale services for resale via fax. See PSCW Pet. 15 (acknowledging that *Michigan Bell*, unlike the instant case, "concerned a pre-Act tariff requirement"). The court merely upheld the Michigan Commission's determination, as a matter of state contract law, that the parties' section 252 interconnection agreement did not "preclude use of the state tariff." 323 F.3d at 357.

The court's holding that the "right of the Commission to enforce pre-existing tariffs as state regulation is consistent with the Act" (*id.* at 359) followed directly from its conclusion that the parties' section 252 interconnection agreement did not preclude reliance on such tariffs. As the

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[2] Even the dissenting judge in this case did not suggest that the majority opinion conflicted with *Michigan Bell*. He read *Michigan Bell* and *Verizon North* as involving applications of the same legal rule to different facts, Pet. App. 10a-11a, and concluded that the Seventh Circuit majority "appears to echo the errors of the Sixth Circuit, which has similarly justified preemption based on interference with § 252's procedures." *Id.* at 10a.

court explained, "*Assuming that the interconnection agreement did not preclude MCI's placing resale orders under Ameritech's tariff obligations*, the agreement and the Michigan tariff obligations can co-exist and work in concert to promote local service competition." *Id.* (emphasis added). The court concluded that "[a]llowing the state tariff *in this particular instance* to stand alongside the [interconnection] Agreement does not frustrate the purposes of the Act" (*id.* at 361, emphasis added) because it believed that it was simply giving effect to the parties' interconnection agreement as it was written. And, even if correct, that conclusion in no way conflicts with the holdings in this case and *Verizon North* that a state commission may not impose access and interconnection obligations on an incumbent LEC without regard to the detailed interconnection agreement procedures prescribed by Congress.

Petitioners' attempt to contrive a conflict with the Tenth Circuit fares no better. The Tenth Circuit's *Sprint* decision is the same decision that the Michigan Commission pointed to when it sought a writ of certiorari in the *Verizon North* case, presenting the same question, making the same arguments, and alleging the same "conflict." See Petition for a Writ of Certiorari, No. 02-1227 (available at 2003 WL 21699546). That petition was denied without dissent. 123 S. Ct. 1649 (Mar. 31, 2003). The Tenth Circuit's decision does not "conflict" with this case any more than it did with *Verizon North*.

While petitioners assert that *Sprint* "*implies* that tariff offerings are valid," PSCW Pet. 16 (emphasis added), it is obvious that the Tenth Circuit never addressed that issue. *Sprint* involved review of a Colorado commission arbitration under § 252 of the Act in which the Colorado commission approved interconnection agreement provisions allowing a competitor to purchase interconnection services on terms set by the agreement or on terms contained in the incumbent LEC's tariff. The parties to that case waived any argument

that it was impermissible for the State to require Qwest to tariff its interconnection and access offerings. Indeed, the Tenth Circuit twice noted that "[i]t is uncontroverted that Qwest is required by Colorado law to file tariffs disclosing the prices and terms for its services," 275 F.3d at 1245 n.4, and "MCI, Sprint and Qwest agree that, under Colorado law, a CLEC has the right to purchase services from an ILEC pursuant to the ILEC's tariffs without negotiating an interconnection agreement." *Id.* at 1250 n.10. No party questioned those requirements. Rather, the issue confronting the Tenth Circuit was, *assuming* that the state-law tariffing requirement was lawful, whether the 1996 Act prohibited a state commission from approving an interconnection agreement that allowed a competing LEC to "mix and match" terms and conditions from the interconnection agreement and the tariff. While the Tenth Circuit answered the latter question in the affirmative, it did not address, either explicitly or impliedly, the question resolved in this case and *Verizon North* — namely, whether a state commission may simply disregard the interconnection agreement process mandated by the Act in imposing interconnection and access obligations.

Finally, petitioners attempt to bolster their assertions by pointing to the FCC's *Texas Preemption Order* (*In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460 (1997), aff'd, 164 F.3d 49 (D.C. Cir. 1999)). See PSCW Pet. 16-17; WorldCom Pet. 22. The FCC's *Texas Preemption Order* is simply not on point.

The question before the FCC was whether a state-law requirement in Texas was preempted because it was "inconsistent with the [Act's] wholesale pricing standards," or "would have the effect of prohibiting carriers from reselling incumbent LEC services in violation of section 253(a) of the Act." *Texas Preemption Order* ¶ 131. The FCC concluded that the tariff was not invalid for either reason, but said *nothing* about the issue at stake in this case.

As the Sixth Circuit observed, the question whether competitors could acquire services from incumbents pursuant to state commission mandates imposed outside the Act's comprehensive federal system of negotiation and arbitration "is not discussed, relied upon, or even challenged in [the *Texas Preemption Order*]." *Verizon North*, 309 F.3d at 944 n.5.[3]

When the FCC later addressed the question presented here, it agreed with the Sixth and Seventh Circuits. In the *Virginia Preemption Order* (*In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27039 (2002)), the FCC held that where carriers "ask a state commission to set rates or resolve other issues relating to the interconnection agreement, a carrier *cannot use tariffs to circumvent* the Commission's determinations under section 252 or the right to federal court review under section 252(e)(6)." *Id.* ¶ 602 (emphasis added). Verizon (the incumbent) sought to "establish tariffs as the primary, central source for applicable prices," *id.* ¶ 594, and WorldCom opposed Verizon, arguing: "Congress chose not to rely on the historically tariffed regime with respect to interconnection and network element prices. Instead, it set up an alternative, detailed process, requiring negotiation, arbitration, approval, regulatory review, and federal court review, to ensure that the resulting agreement complies with federal law." *Id.* ¶ 592. The FCC agreed with WorldCom, holding that Verizon could not use tariffs to circumvent the section 252 process. *Id.* ¶¶ 599-602. Indeed, the FCC held that while "parties are certainly free to agree that services will be provided pursuant to tariffs," that is not the case "[w]here the parties fail to agree." *Id.* ¶ 602. As the district court below noted, "under the regime proposed in this case,

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[3] The FCC found it significant that parties challenging the Texas tariff were not precluded from "invok[ing] sections 251 and 252 of the Act." *Texas Preemption Order* ¶ 139. Here, by contrast, SBC *is* precluded from invoking those sections to the extent a competitor opts for the PSCW-imposed tariff.

the parties *do not agree* that services will be provided pursuant to a tariff." Pet. App. 32a.

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS

A. The decision in this case is fully consistent with this Court's decisions construing the 1996 Act and well-established preemption principles. In *Iowa Utils. Bd.*, this Court stated that "the question * * * is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With respect to the matters addressed by the 1996 Act, it unquestionably has." 525 U.S. at 378 n.6. With respect to "the state commissions' participation in the administration of the new *federal* regime," it is federal law that "draw[s] the lines to which the [States] must hew." *Id.* (emphasis in original). One of the most significant "matters addressed by the 1996 Act" is the interconnection agreement process by which interconnection rights and obligations must be established. Attempts to bypass and undermine that process are invalid.

This Court repeatedly has observed that "[p]re-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade*, 505 U.S. at 98; see also *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("Even without an express provision for preemption, * * * state law is naturally preempted to the extent of any conflict with a federal statute."). The doctrine of implied preemption applies where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). And "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by

examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Further, it is well settled that federal law preempts not only state law that conflicts with federal substantive standards, but also trumps state action that "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Gade*, 505 U.S. at 103 (emphasis added). As this Court held, because "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy," federal preemption extends to "'specially designed procedures * * * to obtain uniform application of [Congress's] substantive rules.'" *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971) (quoting in part *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491 (1953)). "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means" (*Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995)), and courts and administrative agencies alike "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218, 231 n.4 (1994). In short, where "Congress plainly meant to do more than simply to alter the then-prevailing substantive law," but "sought as well to restructure fundamentally the processes for effectuating that policy," state action that conflicts with or undermines Congress's chosen "technique of administration" is preempted. *Amalgamated*, 403 U.S. at 287-288.

State commission action that attempts to bypass the federally-mandated procedures for imposing interconnection and access requirements run afoul of these well-established principles. In the 1996 Act, Congress not only created new substantive obligations, but created detailed procedural mechanisms by which those obligations are to be

implemented. Among other things, the Act requires an initial period of negotiation (47 U.S.C. § 252(a)(1)); permits incumbent LECs to "negotiate and enter into a binding agreement * * * without regard to" the substantive requirements set forth in sections 251(b)-(c) (*id.*); establishes a precise timetable and specific standards for arbitrating any disputed issues (*id.* § 252(b)-(d)); places restrictions on the issues that state commissions may consider in arbitrating disputed issues (*id.* § 252(b)(4)(A)); imposes specific time limits on the state commission's decision (*id.* § 252(b)(4)(C), (e)(4)); and provides for exclusive federal district court review of state commission actions relating to interconnection agreements (*id.* § 252(e)(4) and (6)).

Section 252 unmistakably establishes a comprehensive procedure for implementing federal telecommunications policy through interconnection agreements. See *Verizon North*, 309 F.3d at 939 ("Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationship"). In this self-contained federal framework — consisting of negotiation, arbitration, and approval, all leading up to federal judicial review — Congress clearly mandated "the methods by which the federal statute [is] designed to reach [its] goals." *Gade*, 505 U.S. at 103. As Congress intended, these "specially designed procedures" (*Amalgamated*, 403 U.S. at 287) result in detailed section 252 agreements that constitute the "binding" statement of the parties' respective interconnection rights and obligations. 47 U.S.C. § 252(a)(1).

B. Petitioners argue that Congress has not explicitly preempted state tariffing requirements, and point out that the Act contains several "savings clauses." WorldCom Pet. 23-24; PSCW Pet. 19-20. But this Court has warned against "plac[ing] more weight on the savings clauses than those provisions can bear, either from a textual standpoint or from

a consideration of the whole federal regulatory scheme." *United States* v. *Locke*, 529 U.S. 89, 105 (2000). A savings clause "does not bar the ordinary working of conflict pre-emption principles," and courts must "decline[] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier*, 529 U.S. at 869-870.

In fact, in the savings clauses of the 1996 Act, Congress preserved state regulation *only to the extent that it is not inconsistent with the federal Act.* 47 U.S.C. §§ 251(d)(3), 261(b), 261(c); Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143 (1996). As Judge Boggs noted, "Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the [Act]." *Verizon North*, 309 F.3d at 944. For instance, petitioners rely on section 251(d)(3) (*see* WorldCom Pet. 23; PSCW Pet. 21), but that clause permits only state rules that are *both* "consistent with the requirements of this section" *and* "do[] not substantially prevent implementation of the requirements of this section *and the purposes of this part.*" (Emphasis added.) One of the primary "purposes of this part" (which includes sections 251 through 261) is the establishment of a comprehensive federal mechanism for implementing interconnection and access rights and obligations through interconnection agreements. The PSCW attempted to jettison that process with respect to one of the most hotly-disputed interconnection and access issues confronting carriers – the terms and conditions of access to UNE-P.

Similarly, section 261(b) permits the enforcement of state regulation "not inconsistent with the provisions of this part," and section 261(c) allows state regulation that is "necessary to further competition * * * as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part." As the FCC recently stated in its *Triennial Review Order*, "[s]ections 261(b) and (c) generally preserve state authority to take action pursuant

to state law, *provided that such action is consistent with the Act and our federal framework.*" *Triennial Review Order* ¶ 180 (emphasis added).[4] And section 251(d)(3) permits additional state regulation "only to the extent that state laws or regulations do not conflict with or frustrate the Act and its purposes or substantially prevent the federal *implementation* regime." *Id.* ¶ 186 (emphasis added).

Petitioners also invoke section 601(c) of the Act, an uncodified "savings clause" that provides that the Act "shall not be construed to modify, impair, or supersede" state law "unless expressly so provided." Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143. In the other savings clauses, of course, Congress made clear that the states are forbidden from regulating in a manner inconsistent with the Act, and "expressly so provided." Section 601(c) adds nothing to the ordinary preemption principles at issue here. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) ("neither an express pre-emption provision nor a saving clause 'bars the ordinary working of conflict pre-emption principles'"); *Geier*, 529 U.S. at 869 ("the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles") (emphasis in original).

Petitioners further assert that the Seventh Circuit ignored the "presumption" against preemption where a State acts "within the boundaries of traditional state regulatory authority." WorldCom Pet. 27; see also PSCW Pet. 19. But petitioners ignore this Court's admonition that "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States."

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[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36 (rel. Aug. 21, 2003), available at 2003 WL 22175730 ("*Triennial Review Order*").

Iowa Utils. Bd., 525 U.S. at 379 n.6. Accord *Bell Atlantic-Pennsylvania*, 271 F.3d at 511. Thus, with respect to the "matters addressed" by the Act, Congress "has precluded all other regulation [of telecommunications] except on its terms" — and certainly has precluded conflicting requirements. *Illinois Bell*, 222 F.3d at 343. Accord *GTE North*, 209 F.3d at 923 ("in administering the [Act's] regulatory framework," state commissions "must operate strictly within the confines of the statute"). The implementation of interconnection and access obligations is one of the most significant "matters addressed by the 1996 Act," and thus state regulators are not entitled to any presumption against preemption with respect to such matters. *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. See *AT&T Communications* v. *BellSouth Telecommunications, Inc.*, 238 F.3d 636, 641 (5th Cir. 2001) ("the Court in *Iowa Utilities*, in answer to arguments of the dissenters relying on the presumption against preemption of state regulatory power, responded that the 1996 Act clearly manifested Congress's intent to supplant traditional state police power regulation of local telecommunications competition"); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946-947 (8th Cir. 2000) ("The new regime for regulating competition in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law" (citing *Iowa Utils. Bd.*, 525 U.S. at 379 n.6)).

Similarly, the PSCW's assertion that the principle of *Gade* (that state action is preempted if it "interferes with the methods by which the federal statute was designed to reach [its] goal," 505 U.S. at 103) is inapplicable here because Congress gave state commissions "a 'key role in the regulatory scheme'" is plainly wrong. See PSCW Pet. 22. That "key role" consists of arbitrating, approving, and overseeing interconnection agreements — the very role the PSCW attempted to sidestep with its tariffing requirement. While state commissions may enforce consistent state

regulation when undertaking that role in the interconnection agreement process, this does not mean they can bypass that process altogether. Further, the FCC applied *Gade* in the very FCC decision that petitioners attempt to rely on here — the *Texas Preemption Order*. *Texas Preemption Order* ¶ 50.[5]

C. The PSCW also invokes section 252(f) of the Act, which allows an incumbent to submit for state commission approval a generic "statement of generally available terms ("SGAT"), and argues that that section "clearly contemplates the co-existence of tariffs and interconnection agreements." PSCW Pet. 21-22. It does nothing of the sort.

To begin with, section 252(f)(1) states that an incumbent "*may* prepare and file" an SGAT. 47 U.S.C. § 252(f)(1) (emphasis added). Nothing in the Act *requires* an incumbent to file an SGAT or allows a state commission to force it to do so. Moreover, even if section 252(f) were an alternative *federal statutory* vehicle for implementing the local competition provisions of the 1996 Act (which it is not), that would provide no support for the proposition that a *state commission* can use an *extra-statutory state method* of implementing those provisions. Indeed, as the Sixth Circuit correctly held in *Verizon North*, "§ 252(f) actually illustrates why [a] tariff procedure is inconsistent with, and therefore preempted by, the Act." 309 F.3d at 943. In particular (*ibid.*),

> the same subsections of § 252 provide the same carefully-designed review process for a § 252(f) statement as they do for an interconnection

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[5] Petitioners' assertion that the Seventh Circuit somehow erred in accepting a "facial" challenge to the PSCW's order "irrespective of the terms of any interconnection agreement" (WorldCom Pet. 26-27) is inexplicable. There is no valid application of the PSCW's order because the PSCW itself attempted to impose interconnection and access obligations irrespective of the interconnection agreement procedures prescribed by Congress.

> agreement – the statement is to be presented to the relevant state commission for approval, the FCC can step in to approve the statement if the state commission does not act, and the state commission's actions are subject to federal court review. * * * [The] tariff procedure bypasses all of this procedure.

Thus, "nothing in the language of § 252(f) suggests that it provides an alternative route around the interconnection agreement process for competitors of Bell companies that have filed § 252(f) statements." *Verizon North*, 309 F.3d at 942-943.[6]

In any event, section 252(f) plainly is *not* a method of implementing the local competition provisions of the Act. Rather, as the Seventh and D.C. Circuits have explained, a section 252(f) SGAT is simply a vehicle that may be available under limited circumstances to at Bell Operating Company ("BOC") to facilitate its application to the FCC for approval to provide interLATA *long distance service* to the BOC's own customers. *Illinois Bell*, 222 F.3d at 329-330; *AT&T Corp.* v. *FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000). In other words, an SGAT is the procedure by which a BOC demonstrates how it *would offer to provide* access and interconnection *if* any new entrant were to make a request to commence negotiation of an agreement under section 252.

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[6] Petitioners also quibble with Judge Posner's observation that the commission has undermined the bargaining process by forcing SBC to state its "reservation price." See WorldCom Pet. 24-25. That is a red herring. The fundamental issue here is whether state requirements that "interfere with the procedures established by the federal act" by "enabl[ing] would-be entrants to bypass the federally ordained procedure" are preempted. Pet. App. 6a-7a. Both the Seventh and Sixth Circuits answered that question in the affirmative and no other court has disagreed.

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT PREVENT STATES FROM IMPLEMENTING LOCAL POLICIES

Petitioners suggest that the Seventh Circuit's decision is inconsistent with "Congress' invitation to the states to participate in the Act's cooperative federalism," which includes "the opportunity for state commissions to engage in substantive policy making under state law to promote competition." PSCW Pet. 23-24. State commissions *are in fact* participating at "Congress' invitation," but they must play by Congress's rules. Cooperative federalism means, among other things, that states cooperate and work within the framework and "specially designed procedures" fashioned by Congress. See *Amalgamated*, 403 U.S. at 287.

There is no merit to the PSCW's suggestion that without the ability to impose tariffed interconnection and access obligations by fiāt, state commissions are powerless to effectuate local policies. Congress not only protected the ability of state commissions to engage in substantive policy-making, but, to the extent that policy-making concerns the prices, terms and conditions of incumbent-to-competitor interconnection and access, expressly provided the "means" by which state commissions can (and must) implement those policies — in review and approval of interconnection agreements. 47 U.S.C. § 252(e)(3). The Seventh Circuit recently confirmed the power of the States to promulgate substantive rules that are consistent with section 252 procedures where "federal law leaves a gap-filling role for the states." *AT&T Communications of Illinois, Inc.* v. *Illinois Bell Tel. Co.*, __ F.3d __, 2003 WL 22533675, at *6 (7th Cir. Nov. 10, 2003). State commissions are by no means powerless if denied the ability to evade the interconnection agreement procedures created by Congress: *every* interconnection agreement must be reviewed and approved by a State commission. *Id.* § 252(e)(1) ("Any interconnection agreement adopted by negotiation or

arbitration shall be submitted for approval to the State commission"). Even agreements adopted by negotiation can be rejected by a state commission if it concludes that the agreement "discriminates" against other carriers or that "the implementation of such agreement * * * is not consistent with the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A)(i)-(ii).[7]

The only alleged "benefit" of imposing access and interconnection obligations via tariffs rather than through the procedures mandated by Congress that petitioners are able articulate is avoidance of the prospect of "delay" in the formation of an interconnection agreement. Tariffs, petitioners assert, allow a competitor to "avoid[] most § 252 negotiation expenses." PSCW Pet. 27. But Congress already created a procedure to allow new entrants to secure a contract quickly and efficiently. Section 252(i) of the Act allows competitors to opt in to the terms and conditions of an agreement already approved by the state commission, so that

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[7] This case bears no resemblance to *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), relied on by petitioners. *Ours Garage* involved provisions of the Interstate Carrier Act that expressly preempted state *economic* regulation by both "State[s]" and their "political subdivision[s]," while expressly preserving the power of "State[s]" to exercise safety regulatory authority. *Id.* at 428. The issue was whether States' political subdivisions were preempted from exercising safety regulatory authority. The Court held they were not because there was no clear statement from Congress that it intended to override the States' traditional prerogative to delegate authority to their political subdivisions — the "ordinary method by which States enforce such rules." *Id.* at 428, 436. This case does not involve any dispute over the power of the states to delegate regulatory authority. Further, under the 1996 Act, Congress did not preserve state tariffing requirements. And it preserved state regulation only to the extent it is consistent with the Act. Congress specified the methods that state commissions can use to promote competition — interconnection agreement arbitration, review, and approval.

a carrier need not engage in "de novo" negotiations. Further, the 1996 Act requires all carriers, including incumbents, to "negotiate in good faith" (47 U.S.C. § 251(c)(1)), and both the FCC and state commission are empowered to resolve complaints (and impose penalties) regarding violations of that duty — including "actions that are intended to delay negotiations." *First Report and Order*, 11 F.C.C.R. 15,499 ¶¶ 143, 154 (1996).

The present case disproves petitioners' argument that state-imposed tariffs reduce the "time delays" associated with the section 252 process. The Wisconsin proceeding at issue was instituted on December 15, 1999. Pet. App. 39a. The PSCW issued its Final Decision on September 25, 2001, *more than 21 months later*, noting that "[t]his proceeding has been complex and time-consuming, and more is yet to come." *Id.* at 38a-39a. On November 14, 2001, nearly *23 months* after the proceeding was initiated, the PSCW issued its Order Denying Rehearing. *Id.* at 76a. Under the procedures mandated by Congress, by contrast, state commissions are *required* to complete any arbitration "not later than 9 months after the date on which" the competitor first requested to negotiate the interconnection agreement. 47 U.S.C. § 252(b)(4)(C). Because no party can request arbitration until the 135th day after the negotiation request (*id.* § 252(b)(1)), the *longest* time a state commission could have to complete an arbitration is approximately *4½ months*.

Moreover, the FCC has made clear that concerns about "lag[s]" in negotiating interconnection agreements do not justify "interfering with the contract process." *Triennial Review Order* ¶ 701. In the *Triennial Review* proceeding, several carriers urged the FCC to "unilaterally change all interconnection agreements" to reflect the new FCC rules established in that proceeding, "to avoid any delay associated with renegotiation of contract provisions." *Ibid.* The FCC refused, holding that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of

section 251 and section 252." *Ibid.* In accordance with Congress's desire to create a de-regulatory framework for local telecommunications competition based on private negotiation, the FCC held that "individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules." *Id.* ¶ 700. The tariff order at issue here impermissibly denies incumbent carriers this opportunity.

Petitioners baldly assert that "[t]he Commission's tariff requirement benefits a competitor without harming the incumbent" (PSCW Pet. 26), pointing to the dissent's assertion in this case that SBC's pricing is already "quasi-public" and thus SBC is not harmed by disclosure of its "reservation price" in a tariff. But that is far from the only harm the tariffing requirement inflicts.

The tariff order here creates an unfair and unbalanced situation in which competing LECs have full discretion to use tariffs in place of an interconnection agreement, or negotiate an agreement, or pick and choose the parties' rights and obligations from each. But incumbent LECs would always have a duty to negotiate binding section 252 contracts and could not simply refer competing LECs to tariffs as a complete displacement of all or any part of the interconnection agreement process. Congress did grant "'most promiscuous rights' * * * to competing carriers vis-à-vis the incumbents," *Iowa Utils. Bd.*, 525 U.S. at 397, which are "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Comms., Inc.* v. *FCC*, 535 U.S. 467, 489 (2002). But the system designed by Congress is not without countervailing checks and balances. As Judge Posner explained, Congress did not

allow competing carriers to avoid the same interconnection agreement process to which incumbents must adhere.

Once the negotiation process is triggered, an incumbent like SBC has both duties and rights under the Act's local competition provisions. Among other things, an incumbent LEC has a "right to fulfill its duty [to interconnect] by negotiating the terms of such agreements on its own, without regard to the 1996 Act's substantive standards" and "to enforce its right to a negotiated, binding interconnection agreement" before the state commission and the federal courts. *Verizon Md., Inc.* v. *RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 551 n.3, 555 (D. Md. 2002). Once negotiation is triggered, an incumbent also has a right to invoke state commission arbitration of any disputed issues. 47 U.S.C. § 252(b)(1). In short, in sections 251 and 252 of the Act, Congress established a balanced approach based on its "clear preference" for negotiated interconnection agreements. *Bell Atlantic-Pennsylvania*, 271 F.3d at 500. Tariffing requirements of the kind at issue here turn that into a one-way street, allowing state commissions — at the behest of competing LECs — to impose new and even conflicting interconnection obligations outside Congress's prescribed procedures and without the section 252(e)(6) review contemplated by Congress.

While WorldCom avers that the Seventh Circuit's decision "directly and substantially impairs the ability of MCI and other competing carriers to operate their business" (WorldCom Pet. 28), nothing in that decision prevents carriers from doing exactly what they have done for the last seven years: negotiate and arbitrate interconnection agreements with incumbents.[8] Incumbent and competing

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[8] While WorldCom (at 30) expresses "confusion about the enforceability of * * * freely-negotiated [interconnection agreement] provisions" that allow a competitor access to tariffs, that is an issue of contract interpretation for the state commissions.

LECs have entered into thousands of interconnection agreements. Under those agreements competing carriers have managed to steadily increase their market share, adding several *million* new lines each year. See FCC Wireline Competition Bureau, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 12, 2002, Table 1 (June 2003) (available at http://www.fcc.gov).

The Commission's suggestion that state-imposed tariffs are preempted only if they operate to "preclude[] or create[] a *complete* bypass of § 252 procedures" (PSCW Pet. 27) is erroneous. The Commission believes that it is permissible to side-step Congress's procedural design and impose "core tariff" terms governing the most important aspects of carrier-to-carrier relations (like access to UNE-P) by fiat as long as a state commission allows the incumbent LEC to negotiate *some* "collateral matters" of the carrier-to-carrier relationship (*i.e.*, when and where the bills are to be sent). *Ibid.* But even if the Commission's tariffing order only bypassed Congress's procedures with respect to the core rights and duties created by sections 251 and 252 (the terms and conditions governing access to network elements — which WorldCom acknowledges is "'[f]oremost' among the[] obligations" created by the Act, see WorldCom Pet. 5), while leaving some administrative issues for negotiation, that would not make it any less inconsistent with the federal regime. In any event, the Commission's tariff clearly effects a "complete bypass of § 252 procedures" with respect to the core interconnection matters addressed by that tariff, wiping out the good faith negotiation, arbitration, and review process mandated by Congress.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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